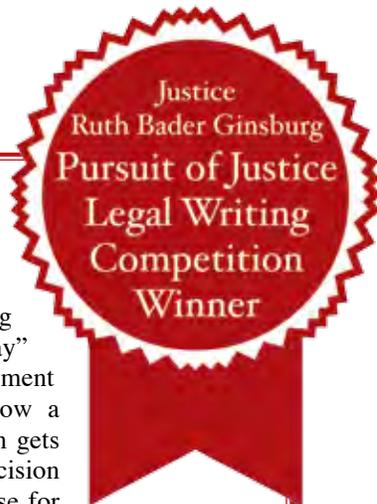


Bending Toward Justice:

Why Plaintiffs Deserve a Mixed-Motives Causation Standard for Retaliation Under Title VII

By Mark Franek



I. Introduction

When Congress passed the Civil Rights Act of 1964 (“Title VII”),¹ it was the beginning of an ambitious attempt to eliminate discrimination in employment based on race, color, religion, sex and national origin. In a speech made in Atlanta, just over three years later, Martin Luther King Jr. said, “Let us realize the arc of the moral universe is long, but it bends toward justice.”² The arc of employment law might be bending toward justice, too, though a closer examination of its evolution might show lurching movements, followed by long periods of relative inactivity.

Over the past 50 years, Congress and the Supreme Court have tinkered with the appropriate causation standards, burden-shifting requirements and jury instructions under Title VII, creating a complex system of rules for bench and bar. One of the most difficult and confusing concepts to result is a mixed-motives causation standard and its pendant mixed motives jury instruction.³ Increasing the confusion is the lack of clarity about whether this framework applies to all disparate treatment and retaliation plaintiffs under Title VII, or only to plaintiffs bringing disparate treatment claims.⁴

The mixed-motives cause of action is more kind to plaintiffs on the issue of liability than the traditional *McDonnell Douglas*⁵ burden-shifting framework, first articulated by the Supreme Court in 1973.⁶ Under the *McDonnell Douglas* framework, once a plaintiff has established a prima facie case, the burden of production shifts to the employer to come forward with legitimate, non-discriminatory evidence for its adverse employment decision.⁷ If the employer articulates a non-discriminatory reason for the adverse employment action, the burden of production shifts back to the plaintiff to demonstrate that the employer’s proffered reason was a pretext to mask unlawful discrimination.⁸ The burden of persuasion always remains with the plaintiff, and the plaintiff is entitled to relief only if his or her protected status was the but-for (determinative) cause of the adverse employment action.

In contrast, under the mixed-motives causation standard, announced by Price Waterhouse⁹ in 1989, and then revised and incorporated by Congress in the Civil Rights Act of 1991,¹⁰ once a plaintiff has proven by a preponderance of the evidence that an illegal motivating factor played a role in the adverse employment decision,¹¹ the burden of production and persuasion shift to the employer, which is entitled to a partial (some might argue a near-complete) affirmative defense.¹² The employer cannot escape liability but can substantially

limit its damages.¹³ If the employer can show by a preponderance of the evidence that it would have made the “same decision” even without considering the illegal motivating factor, the plaintiff’s attorney “may” collect legal fees and costs, but payment is unlikely since most judges follow a “proportionality principle” that often gets eviscerated by a successful same-decision defense.¹⁴ The outcome is even worse for the plaintiff, who “may” receive injunctive or declaratory relief, but cannot collect any monetary damages – a painful pyrrhic victory for an employee who has proven that discrimination had in fact occurred, just not enough of it to trump the employer’s same-decision defense.¹⁵ The mixed-motives causation standard is therefore a mixed-bag for plaintiffs.

Despite its limitations, the mixed-motives framework should be available to all Title VII plaintiffs as it attempts to level the evidentiary playing field. In a litigation context where the employer is often in sole control of its intent, and where the plaintiff may have a less-than-perfect employment record, the mixed-motives framework helps plaintiff’s counsel untangle the threads of possible multiple motivations for an adverse employment decision.¹⁶ Accordingly, Congress should revise the mixed-motives language of Title VII to impose some type of modest economic recovery for plaintiffs when liability is established, but where the employer successfully counters with the same-decision defense. Furthermore, Congress should require the payment of reasonable attorney’s fees and costs, subject to the court’s oversight, once liability is established and regardless of the outcome of the same-decision defense. These revisions and expansions of the mixed-motives causation standard will give Title VII plaintiffs some economic relief for proving that illegal discrimination occurred, encourage plaintiffs’ attorneys to pursue similar cases, and pressure employers to promote zero-tolerance policies and practices for discrimination and retaliation in the workplace. ■

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